

MAR 15 2006

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

WILLIAM ORVAL GIBBONS,

Petitioner - Appellant,

v.

E. K. MCDANIEL,

Respondent - Appellee.

No. 04-16224

D.C. No. CV-01-00159-DWN

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding

Submitted March 8, 2006^{**}

Before: CANBY, BEEZER and KOZINSKI, Circuit Judges.

Nevada state prisoner William Orval Gibbons appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition challenging

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

his 1979 jury conviction for first degree murder. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

Gibbons contends that the district court should have offered him the opportunity to stay his mixed habeas petition so that he could return to state court to exhaust his unexhausted claims.¹ We review for abuse of discretion the district court's decision to grant or deny a "stay and abeyance" of a habeas petition. *See Rhines v. Weber*, 544 U.S. 269, 125 S. Ct. 1528, 1534-35 (2005).

No abuse of discretion occurred here. After determining that Gibbons's habeas petition was mixed, the district court gave him the opportunity to exercise his options under *Rose v. Lundy*, 455 U.S. 509, 510 (1982), and offered Gibbons an administrative closure procedure that was the equivalent of a stay and

¹ We reject Gibbons's counsel's attempt to characterize his brief as an *Anders* brief. *See Anders v. California*, 386 U.S. 738 (1967). The *Anders* requirements are relevant "when, and only when, a litigant has previously established a constitutional right to counsel." *Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1987). Because "the right to appointed counsel extends to the first appeal of right, and no further," *id.* at 555, the *Anders* requirements do not apply to Gibbons's counsel in this proceeding. *See Bonin v. Calderon*, 77 F.3d 1155, 1159 (9th Cir. 1996) ("We and the Supreme Court have held that there is no constitutional right to effective assistance of counsel in habeas corpus cases."). Despite the deficiencies in the opening brief, we reach the merits of this appeal because the certified issue has been addressed in both the answering and reply briefs. *See Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) (recognizing that, even if an issue is not raised by an appellant in an opening brief, we may consider the issue if it was raised by the appellee in its brief).

abeyance. Gibbons rejected that procedure and knowingly and voluntarily elected to abandon the unexhausted claims in order to proceed with the exhausted claims.

AFFIRMED.